Supreme Court, U. S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1277.

STATE OF MARYLAND,
PETITIONER,

v.

JOHN EDWARD JONES,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

Brief for Respondent in Opposition.

F. LEE BAILEY,
One Center Plaza,
Boston, Massachusetts 02108.
JOEL FEDDER,
2100 One Charles Center,
Baltimore, Maryland 21201.
Attorneys for Respondent.

Of Counsel:
KENNETH J. FISHMAN,
One Center Plaza,
Boston, Massachusetts 02108.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions	2
Statement of the case	3
Argument	5
I. The judgment of the Court of Appeals of Maryland was based on adequate state grounds.	5
II. The Court of Appeals of Maryland correctly determined, pursuant to the applicable decisions of the Supreme Court of the United States, that the respondent was denied a speedy trial in violation of his rights under the Sixth and Fourteenth Amendments.	7
III. The Court of Special Appeals of Maryland erred in its determination that the respondent's due process rights were not violated by the Maryland constitutional provision establishing the jury in criminal cases as the judges of law as well as of fact and the trial judge's charge to the same effect.	10
Conclusion	12

Table of Authorities Cited.

Cases.

Barker v. Wingo, 407 U.S. 514 (1972)	7
Chapman v. California, 386 U.S. 18 (1967)	12

Chicago, R.I. & P.R. v. Cole, 251 U.S. 54 (1919) 11
Delli Paoli v. United States, 352 U.S. 232 (1957) 11
Dickey v. Florida, 398 U.S. 30 (1970) 9
Duncan v. Louisiana, 391 U.S. 145 (1968) 11
Epps v. State, 276 Md. 96, 345 A. 2d 62 (1975) 6
Hammerstein v. Superior Court of California, 340 U.S. 622 (1951) 6
Herb v. Pitcairn, 324 U.S. 117 (1945) 6
Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965) 6
Jones v. State, 29 Md. App. 182, 348 A. 2d 55 (1975) 5, 8n
Jones v. State, 279 Md. 1, 367 A. 2d 1 (1976) 8
Malloy v. Hogan, 378 U.S. 1 (1964) 12
Oregon v. Hass, 420 U.S. 714 (1975) 7
Smith v. State, 276 Md. 521, 350 A. 2d 628 (1976) 6
Sparf v. United States, 156 U.S. 51 (1895) 11
Stembridge v. Georgia, 343 U.S. 541 (1952) 6
United States, Ex parte, 101 F. 2d 870 (7th Cir. 1939) 11
Winship, In re, 397 U.S. 358 (1970) 12

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution
Sixth Amendment 2, 6, 7
Fourteenth Amendment 2, 6, 7, 11, 12
Maryland Constitution
Article 15, § 5 3, 10, 12
Article 21, § 5 3, 6
28 U.S.C. § 1257(2) 10

MISCELLANEOUS.

Maryland Rules of Procedure, Rule 828(g) 3

In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1277.

STATE OF MARYLAND,
PETITIONER,

v.

JOHN EDWARD JONES,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

Brief for Respondent in Opposition.

Opinions Below.

The opinions of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland in the instant case are adequately cited in the petition.

Jurisdiction.

It is submitted that the Court does not have jurisdiction to review the instant case because the decision of the Court of Appeals of Maryland rested on adequate and independent state grounds. The facts and law supporting this contention are developed in Argument I, *infra*.

Questions Presented.

I. Did the Court of Appeals of Maryland correctly decide that the indictment against the respondent must be dismissed because the two-and-one-half-year delay between said indictment and trial prejudiced respondent's defense and denied him his state and federal constitutional right to a speedy trial?

II. If the Court grants the instant writ of certiorari, respondent seeks review of the additional question presented below, the merits of which were not reached by the Court of Appeals of Maryland because of its decision to dismiss the indictment on speedy trial grounds:

Does the Maryland Constitution establishing the jury in a criminal case as judges of law as well as of fact and the trial judge's charge to that effect violate federal constitutional due process requirements binding upon the states?

Constitutional Provisions.

This case involves the Sixth and Fourteenth Amendments of the Constitution of the United States, as reflected on

page 2 of the petition. Also relevant to the question presented in the petition is Article 21, Maryland Declaration of Rights, which provides in pertinent part:

> That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury . . ..

If the Court grants the instant writ and considers question II presented above, Article 15, § 5, of the Maryland Constitution will also be relevant. Article 15, § 5, provides:

> In the trial of all criminal cases, the Jury shall be the Judges of law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

Statement of the Case.

Since petitioner's statement of the case is substantially as presented in the agreed statement of facts included in respondent's brief to the Court of Appeals of Maryland pursuant to Maryland Rules of Procedure, Rule 828(g), respondent does not set forth a separate statement of the case except for the few additions to petitioner's statement provided below:

It must be noted that at several times during the period between the indictment and the actual trial in the instant case the setting of a definite date for trial did not occur. First, at the October 12, 1972, hearing, Judge Proctor of

the Circuit Court of Baltimore County ordered that the trial commence no later than December 15, 1972, but no definite date was set at that time (E. at 6).

At the hearing on November 21, 1972, described in the petition at page 5, Judge Proctor disqualified himself (see transcript of November 21, 1972, hearing).

On January 11, 1973, when the plea bargaining agreement relative to the escape charge was filed, no trial date was set for the narcotics case (which is the subject of the instant petition), despite prior assertions by the respondent and his counsel that the narcotics case should have been tried prior to the escape case.

The record reflects that the respondent was at one point scheduled to go to trial on the narcotics charges on February 20, 1973, the same day that he was scheduled to surrender to state authorities in order to begin serving his sentence (E. at 31). The trial did not, however, take place in February of 1973.

When the respondent was indicted on federal charges in May of 1973, no date had yet been set forth for the narcotics trial; and, in fact, at the May 25, 1973, hearing before Judge Proctor, the judge observed that the state trial had priority over the federal trial (E. at 37, 128, 131-132). At the completion of the federal trial on July 21, 1973, no trial date was set for the state narcotics case.

The record does not reflect a reason why the March 11, 1974, date for arraignment and for the setting of a firm trial date, set by Judge Turnbull, was reset for March 26, 1974.

At the hearing held on May 15, 1974, where a ruling was reserved on respondent's motion to dismiss for lack of a speedy trial, respondent had argued that he was highly

prejudiced by the death of Kevin Darby, a co-defendant who allegedly could have proved the respondent's innocence [*Jones* v. *State*, 29 Md. App. 182, 348 A. 2d 55, 73 (1975) (Davidson, J., dissenting)]. On December 11, 1974, after the commencement of the trial in Calvert County, Judge Perry A. Bowen held arguments on respondent's motion to dismiss for lack of a speedy trial (E. at 172-199). The court was informed during argument of the death of two defense witnesses, Darby and Perry, during the period between original indictment and trial (E. at 178-184), and of the disappearance and unavailability of co-defendant, Andrew Strickland (E. at 197).

In his charge to the jury, trial Judge Bowen instructed that the jury were the judges of both law and fact (E. at 201-202). This charge was duly accepted as violative of federal due process requirements (E. at 213-214).

Argument.

I. The Judgment of the Court of Appeals of Maryland was Based on Adequate State Grounds.

It is respectfully submitted that the Court should deny the petition for writ of certiorari to the Court of Appeals in the instant case because the judgment of the Court of Appeals of Maryland dismissing the indictment against the respondent on the basis of denial of his right to a speedy trial rested on an adequate state ground. It is fundamental that, when adequate and independent state grounds exist, this Court will not review the judgments of state courts because there is absent the federal question necessary to

invoke the jurisdiction of the Supreme Court. *See Hammerstein* v. *Superior Court of California*, 340 U.S. 622, 623 (1951); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

Where a state court has decided both state and federal questions, as in the case at bar, review cannot be had if decision of the federal question was unnecessary in light of the disposition of the state question. *See Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487 (1965). Moreover, if the opinion of the state court is ambiguous with respect to whether the issue was decided on federal or state grounds, this Court may dismiss the petition since the burden is on the party invoking the jurisdiction of the Supreme Court to establish that the Court has jurisdiction. *Cf. Stembridge* v. *Georgia*, 343 U.S. 541 (1952).

The decision of the Court of Appeals of Maryland in the instant case is, at the very least, ambiguous as to the actual grounds for its decision, *i.e.*, whether the federal constitutional question or state constitutional question was reached. While, on its face, the decision appears to rest on Sixth Amendment considerations (see Petition, Appendix A, at 5a), a more thorough examination of the opinion reveals that the Court of Appeals relies primarily on its past decisions in *Smith* v. *State*, 276 Md. 521, 350 A. 2d 628 (1976), and *Epps* v. *State*, 276 Md. 96, 345 A. 2d 62 (1975). Both *Smith* and *Epps* find the right to a speedy trial in Maryland ensured to criminal defendants through both the Sixth and Fourteenth Amendments to the United States Constitution and Article 21, § 5, of the Maryland Constitution. *E.g.*, *Smith* v. *State*, 276 Md. at 526.

While the foundation for the state right might closely parallel the federal Constitution and while the Maryland courts may well indeed look for guidance from the federal

judiciary and this Court in interpreting the full scope and effect of the speedy trial guarantee, clearly the state may afford greater protection to criminal defendants than the minimal requirements of the federal Constitution. *See Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). Thus, assuming arguendo that the Court of Appeals of Maryland erred in its application of federal constitutional law to the instant case, this Court would still be without jurisdiction to review the Maryland Court's application of state constitutional law pursuant to which it was determined that the respondent was denied a speedy trial.

II. The Court of Appeals of Maryland Correctly Determined Pursuant to the Applicable Decisions of the Supreme Court of the United States that the Respondent was Denied a Speedy Trial in Violation of his Rights under the Sixth and Fourteenth Amendments.

Assuming arguendo that the petition for writ of certiorari in the instant case properly raises a federal question, thereby enabling this Honorable Court in its discretion to accept jurisdiction, it is respectfully submitted that the Court of Appeals of Maryland correctly applied both the decisions of the Supreme Court of the United States and Maryland precedent in reaching the conclusion that the respondent's Sixth Amendment right to a speedy trial (and the corresponding Maryland constitutional right) was violated during the two-and-one-half-year delay between the respondent's indictment and his trial.

The petitioner concedes that the two-and-one-half-year delay does compel a reviewing court to apply the balancing test prescribed under *Barker* v. *Wingo*, 407 U.S. 514, 530

(1972) (Petition, at 15). What the petitioner does contend is that the Court of Appeals, after an exhaustive review of a very lengthy record, erred in attributing eleven months of delay* "substantially, if not entirely, to the State's dilatoriness." *Jones* v. *State*, 279 Md. 1, 367 A. 2d 1, 6 (1976) (Petition, Appendix A, at 6a).

Basically, petitioner seeks to discredit the findings of the Court of Appeals of Maryland primarily on two fronts: first, by claiming that the court totally failed "to counterbalance the deliberate delays of twelve and six months by Jones" (Petition, at 18), and, second, by asserting that the delays attributed to the State were unintentional (Petition, at 18-19). Both these contentions are unfounded. The Court of Appeals' determination that the eleven-month delay was "overwhelmingly chargeable to the State" (Petition, Appendix A, at 12a) came only after a careful examination of the remaining eighteen months. The eighteen-month period of delay was not viewed as having resulted solely or even significantly from the respondent's intentional actions but rather from neutral reasons for which the respondent certainly cannot be held responsible and from actions of the respondent which were not dilatory but, in most instances, were concessions in order to obtain the counsel of his choice for trial.

---

*In her dissent, Judge Davidson of the Court of Special Appeals of Maryland attributed fourteen and one half months of the delay to the state. *Jones* v. *State*, 29 Md. App. 182, 348 A. 2d 55, 74 (1975) (Davidson, J., dissenting) (Petition, Appendix B, at 56a). The discrepancy between the findings of the Court of Appeals and Judge Davidson is caused only by the different approaches employed by each, *i.e.*, the majority of the Court of Appeals divided the two and one half years into three broad time periods while Judge Davidson examined shorter time intervals to determine to whom the delay was attributable.

The petitioner strenuously urges that the respondent should be held responsible for the period of delay which resulted when the State chose to try various prosecutors and defense attorneys for alleged corruption supposedly connected with the respondent's cases. The Court of Appeals closely reviewed this contention and concluded that the explanation proffered by the State was "no more than a concocted diaphanous smoke screen" (Petition, Appendix A, at 9a), because the State, at the time these events were occurring, had indicated that these proceedings would not interfere with respondent's trial and because the respondent, repeatedly asserting his right to a speedy trial, had, at all times, an attorney (not under investigation) who was ready to go to trial.

The instant petition thus reduces itself to a request to review the independent *findings of fact* made by the Court of Appeals of Maryland. Petitioner claims that the state court improperly applied decisions of this Court to the facts of the instant case, yet fails to substantiate that claim. Petitioner further insinuates that Maryland court decisions are in conflict with federal authority on the speedy trial issue, yet no state cases deviating from the standards applied in the relevant decisions of this Court are cited. Indeed, the decision of the Court of Appeals that the respondent was denied a speedy trial is in complete accord with decisions of this Honorable Court. *See, e.g., Dickey* v. *Florida*, 398 U.S. 30 (1970). For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

III. The Court of Special Appeals of Maryland Erred in its Determination that the Respondent's Due Process Rights were Not Violated by the Maryland Constitutional Provision Establishing the Jury in Criminal Cases as the Judges of Law as Well as of Fact and the Trial Judge's Charge to the Same Effect.

Respondent respectfully submits that, if this Honorable Court grants the instant petition for writ of certiorari, the following issue raised by respondent in both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland should be reviewed: Whether the Maryland Constitution, establishing the jury in a criminal case as judges of the law as well as of fact, and the trial judge's charge in the instant case to that effect are violative of federal constitutional due process requirements binding upon the states.

The Court of Special Appeals answered this question in the negative, relying on prior decisions of the Court of Appeals of Maryland (Petition, Appendix B, at 45a). The Court of Appeals, having dismissed the indictment on the speedy trial issue, found it unnecessary to resolve the second issue (Petition, Appendix B, at 2a, n. 1). Clearly, this Honorable Court would have jurisdiction to review the constitutionality of Article 15, § 5, of the Maryland Constitution, and indeed said review may be had by direct appeal pursuant to 28 U.S.C. § 1257(2) since the validity of a provision of the Maryland Constitution was upheld in the face of a challenge claiming that said provision is repugnant to the Constitution of the United States.

The issue raised herein has yet to be decided by this Honorable Court. While, as early as 1895, the Court held that determinations of law were clearly within the province

of the judge in the federal courts, *Sparf* v. *United States*, 156 U.S. 51 (1895), the Court later held that nothing in the Constitution of the United States requires a state to maintain the line between the functions of the jury and those of the Court. *Chicago, R.I. & P.R.* v. *Cole*, 251 U.S. 54, 56 (1919).

Every state except Maryland now adheres to the federal rule presented in *Sparf*. Indeed, more recent decisions of the Court and the lower federal courts have recognized that the function of the jury as triers of fact *only* is fundamental. *See, e.g., Delli Paoli* v. *United States*, 352 U.S. 232, 242 (1957); *Ex parte United States*, 101 F. 2d 870, 874 (7th Cir. 1939).

Respondent further submits that, from an historical perspective, the function of jurors as triers of fact and *not* of law is an integral part of the constitutional right to a jury trial now binding on the states. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Even if this were not so, it is respectfully submitted that to allow juries generally to determine the law, as does the Maryland Constitution, is to permit possible violations of a criminal defendant's rights which are guaranteed by the federal Constitution and binding on the states through the Fourteenth Amendment.

The Maryland practice at issue is in direct conflict with the modern concept of due process guaranteed by the Fourteenth Amendment, the elements of which were certainly not recognized at the time the decision in *Chicago, R.I. & P.R.* was rendered. The trial judge in the case at bar, as in all criminal cases in Maryland, only advised the jury of the presumption of innocence, of the reasonable-doubt standard and that no unfavorable inference could be drawn from the respondent's failure to testify. Clearly, each of these principles, if not recognized by a jury, would violate the Fourteenth Amendment. *See In re*

Winship, 397 U.S. 358, 364 (1970); *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Chapman* v. *California*, 386 U.S. 18 (1967).

The very fact that the jury in the instant case was not required to adhere to these federal constitutional standards supports the notion that the respondent did not receive a fair trial. That Article 15, § 5, of the Maryland Constitution permits, or indeed compels, this result requires that the provision be struck down as repugnant to the Fourteenth Amendment to the Constitution of the United States. For this reason, respondent respectfully prays that, if the writ of certiorari is granted in the instant case, this Honorable Court also review the issue presented above.

Conclusion.

Based upon the foregoing reasons and authorities, respondent respectfully submits that the petition for writ of certiorari should not be granted, and, if it is, that this Honorable Court also review the issue presented above in Argument III.

Respectfully submitted,

F. LEE BAILEY,
One Center Plaza,
Boston, Massachusetts 02108.
JOEL FEDDER,
2100 One Charles Center,
Baltimore, Maryland 21201.
Attorneys for Respondent.

Of Counsel:
KENNETH J. FISHMAN,
One Center Plaza,
Boston, Massachusetts 02108.